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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

REPLY BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
80 Centre Street
New York, New York 10013
212-488-6044

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

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REPLY BRIEF

A. Habeas Corpus is the only appropriate remedy for reviewing state prisoners' claims relating to the conditions of their confinement.

Petitioners are asking this Court to hold that state prisoners should be precluded from obtaining equitable relief under the Civil Rights Act and required instead to proceed

by way of federal habeas corpus.* Respondents deny that this classification is appropriate because (a) historically, the exhaustion requirement of the habeas corpus statute did not reach prisoner claims unrelated to conviction and sentence, (b) a habeas corpus proceeding is not a better remedy than a civil rights action and (c) in any event, the classification is barred by prevailing precedent. These reasons are unsubstantiated and without merit.

To argue the history of § 2254 is to reason backwards. Classification of prisoners' claims is a *prerequisite* to determining what, if any, exhaustion requirement attaches. Section 2254, whatever its history, is irrelevant unless and until the claims are classified as in the nature of habeas corpus. Moreover, there is nothing in the history of § 2254 which limits the scope of the habeas corpus remedy. As petitioners have already demonstrated, this Court has held that habeas corpus encompasses state prisoners' claims unrelated to conviction and sentence because all of them challenge some form of restraint (Petitioners' Br. pp. 19-20).**

Respondents' denial that habeas corpus is a better remedy is similarly insubstantial because it, too, turns on the anticipated applicability of the exhaustion requirement rather than on deficiencies in the remedy itself (Respondents' Br. p. 31). The very study of pro se litigants

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* The *amicus* brief of the American Bar Association is inapposite in this respect since it does not address itself to this issue but is limited to a discussion of exhaustion under the Civil Rights Act. Petitioners are not asking this Court to distinguish between state prisoners and *other* litigants under the Civil Rights Act. State prisoners are *already* distinguished from all other potential civil rights litigants because they have another statutory remedy for presenting their federal constitutional claims.

** This conclusion has particular force in the three cases at bar which involve good conduct time issues and, hence, directly affect the right to release from physical confinement.

which respondents cite reveals that habeas corpus applications are reviewed more expeditiously and require far less initiative on the part of the prisoner litigant. Ziegler & Kaufmann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 201-205 (1972).

In particular, the study substantiates petitioners' experience with pro se civil rights actions which often stagnate for years. The fate of many of these cases is now being investigated in the Southern District, but only as a result of the computerization and individualized assignment of cases instituted in mid-1972. A recent letter to this office from one Southern District Judge inquired about the status of seven pro se civil rights cases initiated by state prisoners. Of these, one had a 1966 docket number, one a 1969 docket number and five were docketed in 1970.

Even when the pro se litigant is assigned counsel his complaint is given no preference, unlike that of the habeas corpus petitioner. 28 U.S.C. § 2243. In one action presently being defended by this office the complaint was filed in February, 1969, counsel was assigned in July, 1970 and the case has been on the ready calendar in the Southern District since September, 1971.

Respondents also purport to rely on precedent. They cite "a host of cases" in which § 1983 jurisdiction was assumed, albeit "without discussing the habeas-§ 1983 classification problem" (Respondents' Br. pp. 15-16). In addition, they claim that "virtually every court that has explicitly dealt with the problem at issue" has held that § 1983 is available to state prisoners. However, to cite this Court's decision in *Wilwording* v. *Swenson* as authority is to ignore the fact that the proper nature of the cause of action was neither discussed in the opinion nor raised by the parties in the case who instead were solely concerned with the exhaustion requirement of § 2254 as applied to

the habeas corpus petitions there involved.* *Padilla v. Ackerman*, 460 F. 2d 477 (9th Cir.), simply relies on *Wilwording*. And to cite *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2d Cir. 1971) is to deny that the Second Circuit had any reason for reviewing the instant cases *in banc*. See 442 F. 2d at 204, N. 50. In point of fact, none of the cases cited "explicitly" resolves the precise issue before this Court because in none of them was it squarely presented. Therefore, they hardly constitute reasoned, binding precedent.

B. Application of § 2254 to prisoner claims would protect the interests of the federal and state courts without impairing the prisoners' interest in prompt adjudication.

Respondents maintain that an exhaustion requirement will not reduce the number of federal lawsuits and, in any event, will be detrimental to the prisoner. The former argument is totally unrealistic unless one assumes—as respondents obviously do—that the state courts will not grant relief in appropriate cases.** That assumption is unwarranted as petitioners have shown in their main brief (Petitioners' Br. pp. 28-30, 46). Moreover, if the number of prisoner civil rights actions is levelling off, as the brief

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* There is thus no basis for respondents assumption that in *Wilwording* this Court recognized "the difference between [challenges to prison conditions] and suits seeking to set aside state court criminal judgments" for purposes of exhaustion. (Respondents' Br. pp. 17-18). This reading does not take into account the fact that in *Wilwording* exhaustion of the Eighth Amendment claims there raised was required under § 2254.

** Respondents actually suggest that the "Founding Fathers, subsequent Congresses" and this Court "all recognize" that "state remedies are simply inadequate where controversial federal rights are concerned". (Respondents' Br. p. 35). Such a statement is surprising in the context of a case involving § 2254. Nor is there any call for unsupported generalizations to the effect that the state courts are not "interested" in or "sympathetic" to prisoners' claims.

of the American Bar Association suggests, this strongly indicates that claims of state prisoners are being dealt with and resolved by state departments of correction and/or the state courts.*

Also unwarranted is respondents' reliance on the habeas corpus experience of the 1950's and 1960's. It was during that period that this Court rendered a series of far-reaching decisions affecting the rights of criminal defendants. Those decisions resulted in a burst of applications in both the federal and state courts.

The exhaustion requirement is not the only reason why reduction in federal suits must result if prisoners are confined to the habeas corpus remedy. Under the present law when a state prisoner who is unsuccessful in a civil rights action may seek relief in the state courts and, if unsuccessful, he may return to the federal court with a habeas corpus petition. Thus, because *res judicata* does not apply to a habeas corpus application, the state prisoner, unlike the ordinary citizen, has an opportunity to bring at least *two* federal lawsuits with respect to the same claims.

The facts posited are not hypothetical. This was exactly the pattern followed by the petitioners in *Wilwording* v. *Swenson*. Obviously, if the state prisoner is confined to habeas corpus at least one federal lawsuit is eliminated.

Respondents' ultimate concern is that the delay in obtaining a federal forum will deprive them of meaningful

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*It is interesting to note that although the rate of increase of prisoner civil rights actions has declined during the last two years, according to the ABA figures, so has the rate of increase of other civil rights actions. (ABA Br. p. 30). Accordingly, prisoner civil rights actions continue to represent a stable percentage of the total number of civil rights actions filed in the last five years, i.e. approximately 37% of the total.

judicial review. Although they concede that the State Courts will act expeditiously (Respondents' Br. p. 35), their fear again rests on the unsupported assumption that the state courts will be unresponsive.

The answer to this argument is that the same possibility exists in the traditional habeas corpus case. Significantly, experience with those cases demonstrates that the federal courts are capable of determining whether adequate remedies are afforded by a particular state and, as a practical matter, do so everyday. This Court made just such a determination in *Wildwording* with regard to the State of Missouri. The District Court which heard *Johnson* v. *Avery*, 252 F. Supp. 783, 784 (M.D. Tenn. 1966) made such a determination with regard to the State of Tennessee.

The exhaustion requirement of § 2254 functions as a barometer of the interest which each state has in adequately reviewing its convictions and the conditions which exist in its prisons. If a state affords no remedies it thereby indicates to the federal courts that no interest of comity is served by requiring its inmates to tender their claims to the state's courts. The inmate is free in such cases to come directly into federal court and assert his claim by way of federal habeas corpus. On the other hand, in States such as California, which has a long history of reviewing prisoner claims, and New York which also reviews these claims and, moreover, is unique in providing a specific statutory remedy for reviewing prisoners' constitutional claims relating to confi ment, comity requires that these remedies not be ignored.

If state prisoners are required to seek relief from state courts which have shown themselves responsive to prisoner claims their respect for the system which regulates their confinement must be greater than if they obtain that relief

from the federal courts.* The importance of fostering that kind of respect in the context of the prison environment is yet another reason why claims raised by state prisoners are unique.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, January 3, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

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*A *fortiori* this is true of requiring exhaustion of adequate administrative remedies. As in the Court below, respondents have failed to disprove the relevance of administrative review in an area where the state action involved is typically and necessarily less defined by black letter regulation and more dependent on administrative discretion. This is particularly evident in their failure to draw a meaningful distinction between state and federal prisoners in this regard. At best, they refer vaguely to "other considerations" (Respondents' Br. p. 36).

In the context of the instant cases respondents err when they say that the failure to exhaust administrative remedies in *Rodriques* and *Kritsky* resulted from the failure of the superintendent to comply with §236 of the Correction Law. Nothing in that section shifts the burden of initiating administrative review away from the prisoner.

The State of New York has been authorized by the Attorneys General of the following states to add them to the list of States joining with us in our brief on the merits (Petitioners' Br. p. 48).

Honorable William J. Brown	Ohio
Honorable Larry Derryberry	Oklahoma
Honorable A. F. Summer	Mississippi
Honorable Gordon Mydland	South Dakota
Honorable James M. Jefford	Vermont
Honorable Clarence A. Brimmer	Wyoming